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In the

Supreme Court of the United States

TERRY LYNN O'DELL et al.,

Petitioners,

-vs-

THE STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

SUSAN A. KETTLEWELL
PIMA COUNTY PUBLIC DEFENDER
*DEAN J. BRAULT
Assistant Pima County Public Defender
32 N. Stone, 4th Floor
Tucson, AZ 85701
Telephone: (520) 740-5300
ATTORNEY FOR PETITIONERS

**Counsel of Record*

60 pp

QUESTION PRESENTED

MUST A DEFENDANT PROVE THAT EVIDENCE LOST OR DESTROYED BY THE STATE WAS ACTUALLY EXCULPATORY, AS OPPOSED TO POTENTIALLY EXCULPATORY, IN ORDER TO ESTABLISH A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT UNDER *ARIZONA v. YOUNGBLOOD*, 488 U.S. 51 (1988)?

LIST OF PARTIES

Terry Lynn O'Dell,
Marcos Tellez Poblette,
William Whytasha Morgan,
Miguel Canedo Avilez,
Ike Paul Jimmerson,
Freddy Elizondo Martinez,
Eugene Alvardo Vasquez,
Rigoberto Lujan, Jr., and
Reginald Cole Johnson, PETITIONERS

State of Arizona, RESPONDENT

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No. _____

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SUPREME COURT OF THE UNITED STATES

TERRY LYNN O'DELL, et al.,	)
Petitioners,	)
-vs-	)
THE STATE OF ARIZONA,	)
Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioners Terry Lynn O'Dell, Marcos Tellez Poblette, William Whytasha Morgan, Miguel Canedo Avilez, Ike Paul Jimmerson, Freddy Elizondo Martinez, Eugene Alvardo Vasquez, Rigoberto Lujan, Jr., and Reginald Cole Johnson pray that the Court issue a writ of certiorari to review the judgment of the Arizona Supreme Court denying review and the Arizona Court of Appeals vacating the order dismissing their driving under the influence charges for a violation of the Due Process Clause of the Fourteenth Amendment and *Arizona v. Youngblood*, 488 U.S. 51 (1988).

OPINION BELOW

The Opinion vacating the order dismissing the charges in the Petitioners' cases was rendered on May 30, 2002. It was published and it is reported at 46 P.3d 1074, 202 Ariz. 453. It is attached as Appendix A to this Petition. The unpublished decision of the trial court was rendered on January 25, 2001 and is attached as Appendix B. The trial court issued a minute entry dated January 25, 2001 that was filed on January 31, 2001 that amended the caption that is attached as Appendix C. The Arizona Supreme Court's denial of the Petition for Review was rendered on October 29, 2002 and was unpublished. It is attached as Appendix D.

JURISDICTION

The Supreme Court of Arizona entered its order denying review on October 29, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions.

> The Fourteenth Amendment to the United States Constitution states, in relevant part:
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No Statute shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

All petitioners were charged with felony offenses stemming from allegations of driving under the influence of alcohol and driving with a prohibited alcohol concentration. On November 4, 1999, Petitioner Terry Lynn O'Dell filed a Motion for Disclosure. ROA 17[1]. That request was for the state to disclose information stored in the memory of the breath testing device used to test Mr. O'Dell, or in the alternative, to sanction the state for failure to disclose that information under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend. VI, XIV, §1, ROA 17 at 7-17. Petitioner filed an Amended Motion for Sanctions on August 22, 2000 which also requested disclosure of the information or sanctions under the Sixth and Fourteenth Amendments. ROA 62 at 12-20. The eight other Petitioners joined the motion filed in Mr. O'Dell's case on various dates prior to the trial court's ruling.

The trial court conducted a two-day evidentiary hearing that concluded on December 11, 2000. Petitioners called Chester Flaxmayer as an expert witness who is a criminalist

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[1] ROA refers to the Record on Appeal.

formerly employed by the Arizona Department of Public Safety with vast experience with breath testing devices. RT 12/11/00 at 8-10[2]. The evidence presented to the trial court established that all the Petitioners were given breath tests on an Alcohol Data Acquisition Management System (ADAMS) Intoxilyzer 5000 that is located at the Pima County Jail. It has a vapor recirculator and a memory chip. ROA 78 at 8-9. The vapor recirculator uses a known alcohol solution to check the accuracy of the device before and after each subject test. ROA 78 at 8-9. The memory chip records all information generated by the ADAMS Intoxilyzer, including: every subject breath test result, every concurrent calibration check, all data generated during monthly calibration checks and quarterly standard quality assurance procedures, every diagnostic test, and all error messages generated. ROA 78 at 2-4.

This data is electronically preserved in the Intoxilyzer's memory. ROA 78 at 10. The ADAMS Intoxilyzer has the capacity to store approximately 100 subject tests. RT 12/11/00 at 18. When the memory is full, new data begins to overwrite the oldest data. ROA 78 at 19, RT 12/11/2000 at 18.

The state only discloses the paper print card including the subject tests and concurrent calibration checks, a paper checklist used for the subject test, the paper forms and test cards for the surrounding monthly calibration checks, and paper forms and test cards for quarterly quality assurance tests.[3]

The Department of Public Safety(DPS) owns and maintains this Intoxilyzer. RT 11/6/00 at 36-7. The DPS downloads data by phone lines and modems for numerous

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2 RT refers to Reporter's Transcript.

3 Stipulated Exhibits 3-6, made part of the Record on Appeal by order of the Arizona Court of Appeals on September 10, 2001. These exhibits were accepted by the trial court by stipulation of the parties and only refer to Petitioner Terry Lynn O'Dell.

Intoxilyzers. ROA 78 at 2, 10-11. The DPS normally downloads the data two to three times per week onto a personal computer located in a crime lab. ROA 66 at 71 of 132. The memory is sent from the crime lab to the Arizona Criminal Justice Information System mainframe computer where it can be accessed from terminals around the state. ROA 78 at 1, 11-12.

The ADAMS memory reveals problems that question or invalidate test results that are impossible or impractical to discover from paper records alone. RT 12/11/00 at 22-71, 75, 85, 99, 101. Paper records that should be saved and disclosed are not always saved and disclosed. *Id.* at 25, 27, 40, 46-52. Error codes relevant to reliability and establishing statutory foundation for admissibility are saved in the memory which may or may not be displayed on a print card. *Id.* at 23-4, 41-9. Records of some problems do not generate a print card. *Id.* at 48, 52-3, 60. The state routinely relies on an assumption that no problems or maintenance occurred between successful monthly calibration checks to conclude that a device was in proper operating condition at the time in order to admit breath test results into evidence. *Id.* at 46, 74.

A device can pass its monthly calibration check, but experience serious problems or calibration failures in the interim that require the device to be removed from service and be repaired. *Id.* at 34-61. Mr. Flaxmayer stated:

> I personally have seen instances where according to the paper records the Intoxilyzer was working but the data base shows either that the instrument was not working, that it had malfunctioned and broken in between those paper records. I've seen instances where the operators made mistakes, where there were other tests on defendants that were not reported. Basically just about any mistake a human can make you can find an example of in a data base.

Id. at 23-4. Some of these problems that are found only in the ADAMS database allow an expert to conclude, without doubt, that some test results are unreliable or bad. *Id.* at 77. Mr. Flaxmayer has reached such conclusions despite paper records indicating passing monthly calibration checks and quality assurance procedures. *Id.* at 54-55. Analysis of the ADAMS database has also discovered undocumented and undisclosed repairs. *Id.* at 37, 46-47, 77. While there is no evidence of what percentage of tests have problems that are discovered only through analysis of the data, Mr. Flaxmayer testified that problems routinely appear in the database. *Id.* at 136.

The state made no effort to preserve the ADAMS memory during four years of litigating this issue and despite being previously ordered to disclose the information by another Superior Court judge. RT 11/6/2000 at 14-78, ROA 66, RT 11/30/89, RT 12/14/98, RT 1/15/99. The state claimed that the decision not to preserve the information was justified because it would have been too expensive. RT 11/6/00 at 39-40. A one-time cost of approximately $200 could allow the data system already in place to be used . RT 12/11/2000 17-18. No problems existed with other agencies that would have interfered with the exercise of that option. RT 11/6/00 at 14-35, 67-72. The state did not make any effort to arrange funding to preserve the information in the Intoxilyzer, nor did it seek the cooperation of any of the relevant agencies. *Id.* at 50-51.

The DPS claimed to act in good faith because preservation of the data might have led to future litigation over selective data deletion and the discovery of failed calibration tests in the data as was happening in other parts of the state. *Id.* at 39-40, 44-48, 59-60. The local commander of the DPS stated, "so it was DPS' philosophy that we would be basically dammed if we hooked it up and damned if we didn't." *Id.* at 46. The local DPS commander decided to "put everything on hold until there was more legal standing or legal guidance from my department or from the courts as to whether or not

it was required to hook it up." *Id.* at 47. That decision was made after consultation with DPS' legal department as well as the Pima County Attorney's Office. *Id.* at 52.

At the conclusion of the evidentiary hearing, the trial court ordered written argument which the state filed on January 12, 2001 and the petitioners filed on January 17, 2001. ROA 81, ROA 82. Both the Petitioner's and Respondent's briefs addressed the propriety of sanctions under the Due Process Clause of the Fourteenth Amendment. ROA 81 at 8-12, ROA 82 at 4-10.

On January 25, 2001, the trial court issued an Under Advisement Ruling dismissing all driving under the influence charges with prejudice. App. B. The trial court relied on the Due Process Clause of the Fourteenth Amendment, *Arizona v. Youngblood* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) in dismissing the charges. App. B at 6b-7b.

The trial court found that the ADAMS data can identify problems that prove that some test results are unreliable and that it has proved when paper records were inaccurate or incomplete. *Id.* at 2b-3b. The trial court made explicit findings of fact that the state knew about the nature and quality of the ADAMS data long before any of these cases were filed. *Id.* at 3b. The trial court expressly found the state's excuses for not downloading the information were not credible. *Id.* at 4b-5b. The trial court considered the state's prior failure to follow an order of another Superior Court judge to preserve the information as well as the consistent litigation to block disclosure of the ADAMS data as further evidence of bad faith. *Id.* at 5b.

The trial court found the state's refusal to preserve the information inexcusable. *Id.* at 6b-7b. The trial court found that the state acted in bad faith by "intentionally or at least knowingly allow[ing] evidence that is, in general

terms, clearly exculpatory to be systematically destroyed." *Id.* at 7b. The trial court found that the evidence was at least potentially exculpatory. *Id.* at 6b. The trial court concluded that dismissal of the driving under the influence charges was appropriate under *Arizona v. Youngblood*, 488 U.S. 51. *Id.* at 7b, 9b.

The Respondent filed a notice of appeal in Mr. O'Dell's case ROA 86. On May 15, 2001, the Respondent filed an opening brief of its appeal with the Arizona Court of Appeals addressing the issues under the Sixth and Four teenth Amendments. Opening Brief at 14-30. On July 2, 2001, the Petitioners filed a response addressing the same issues. Response Brief at 7-22. The Respondent filed a reply that addresses the federal question at issue on July 27, 2001. Reply Brief at 5-13.

On May 30, 2002, the Arizona Court of Appeals vacated the order of the trial court and remanded the case. 46 P.3d 1074, 202 Ariz. 453. The federal question sought to be reviewed appears in that Opinion at App. A. at 5a-14a.

On July 29, 2002, Petitioners filed a timely Petition for Review to the Arizona Supreme Court which raised the federal questions sought to be reviewed. Petition for Review at 2-12. The Respondent filed a response on August 28, 2002 that addressed the federal questions. Response to Petition for Review at 7-9. On October 29, 2002, the Arizona Supreme Court denied the Petition for Review. App. D.

REASONS FOR GRANTING THE PETITION

I. THE OPINION OF THE ARIZONA COURT OF APPEALS DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *ARIZONA v. YOUNGBLOOD*, 488 U.S. 51 (1988).

The Opinion of the Arizona Court of Appeals directly

contradicts the explicit holding of *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58. The Arizona Court of Appeals explicitly stated that the failure to preserve potentially exculpatory evidence cannot establish a due process violation because actual prejudice cannot be shown. App. A. at 8a. The Arizona Court of Appeals stated:

> The mere possibility that destroyed evidence could have exculpated a defendant is insufficient to establish a due process violation, as there has been no showing of prejudice to the defendant. *Arizona v. Youngblood*, 488 U.S. at 56 n., 109 S.Ct. at 336 n., 102 L.Ed.2d at 288 n.; *State v. Youngblood*, 173 Ariz. at 507, 844 P.2d at 1157; *Walker*, 185 Ariz. at 238, 914 P.2d at 1330. If the state fails to preserve evidence that has not been tested and only might have been exculpatory, the evidence is not constitutionally material and *no prejudice can be shown.*

App. A. at 8a. (emphasis added).

The Opinion of the Arizona Court of Appeals thereby categorically precludes a finding of bad faith in any case where the state successfully destroys evidence. *Id.* Without the evidence, the defendant can never prove that the evidence was exculpatory in his or her case and can therefore never prove actual prejudice. The Arizona Court of Appeals further reasoned that if the defendant cannot prove actual prejudice, the state does not act in bad faith. *Id.* at 11a. "Because the record fails to support a finding that the ADAMS data *was exculpatory in this case*, the trial court improperly concluded that the state had acted in bad faith under *Arizona v. Youngblood* and *State v. Youngblood.*" *Id.* (emphasis added). Such reasoning is a

preposterous exercise in circular logic and exceeds the showing needed to trigger the due process protections afforded the accused.

In reaching this conclusion, the Arizona Court of Appeals cited the footnote in *Youngblood* to claim that "[t]he mere possibility that destroyed evidence could have exculpated a defendant is insufficient to establish a due process violation, as there has been no showing of prejudice to the defendant." App. A at 8a citing 488 U.S. at n.56. While the meaning of that footnote is subject to multiple interpretations, the Arizona Court of Appeals clearly misconstrued the meaning of that passage given the holding of *Youngblood*. *See* Note, "The Role of Police Culpability in Leon and Youngblood," 76 Va.L.Rev. 1213 at 1223 (1990).

This Court clearly indicated in that footnote that *Youngblood* was a "sharp departure from *Trombetta* in two respects." 488 U.S. at n.56; *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). First, this Court noted that the possibility that the evidence could be exculpatory if it were preserved and tested fails to meet *Trombetta's* constitutional materiality standard. 488 U.S. at n.56. Second, this Court noted that the value must have been apparent *before* the evidence was destroyed. *Id.*

The Arizona Court of Appeals nonetheless read the footnote in *Youngblood* to require defendants to continue to meet a strict showing of constitutional materiality under *Trombetta* as well as bear the burden of proving bad faith in cases involving the loss or destruction of potentially exculpatory evidence. This Court stated that to meet the standard of constitutional materiality, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 457 U.S. at 489.

The holding in *Youngblood* was designed to avoid the

materiality analysis required in cases where the evidence still exists like *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). 488 U.S. at 57. This Court stated that the difference in treatment is justified in part because, "'[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'" 488 U.S. at 57 (citing 467 U.S. at 486).

Reverting to a materiality based standard will yield inconsistent and illogical results. A strict materiality analysis requires a post-trial analysis of the impact of the missing evidence on the confidence in the verdict. *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985). Finding a due process violation would necessarily depend entirely on the trial court's speculation of the potential value of the missing evidence to the defendant and on the relative degree of guilt of the defendant. The same animus of the state and chances of discovering useful information would have to yield different results based on those speculations. In cases where the bad faith of the state is systemic and aimed at a class of defendants, the disparity in results would be illogical. This Court's intent in *Youngblood* was to abandon the speculation associated with the materiality analysis and focus on the bad faith of the state. 488 U.S. at 58.

By predicating a finding of bad faith on meeting the standard for constitutional materiality in cases where potentially exculpatory evidence is destroyed, the Arizona Court of Appeals imposes a burden on criminal defendants that this Court has acknowledged is unattainable. 488 U.S. at n.56. Defendants already bear an obviously high burden to prove that the state acted in bad faith when destroying or failing to preserve the evidence. This Court has already proclaimed that meeting this burden is sufficient. *Id.* at 58.

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve

> evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence *could* form a basis for exonerating the defendant.

Id. (emphasis added). This Court did not require that the conduct of the police indicate that the evidence *would* exonerate the defendant, only that it *could be* exculpatory. *Id.*

The Arizona Court of Appeals never claimed that the evidence was not potentially exculpatory. The trial court's finding that the evidence was potentially exculpatory was not discussed or disturbed. The Court of Appeals did, however, concede the existence of a small chance that the ADAMS data would have been exculpatory. App. A at 11a.

By requiring proof that the evidence was exculpatory, the Arizona Court of Appeals shifted the focus away from the actions and motives of the state to the defendants' inability to prove the unprovable. Ironically, while the destruction of the evidence precluded the Petitioners from establishing that the evidence was exculpatory, that fact did not prevent the Arizona Court of Appeals from reaching the opposite conclusion.

The burden placed on the Petitioners is impossible to meet because in order to prove that the state had actual knowledge that the evidence was exculpatory, a defendant will either need the evidence or have access to comparable evidence. A confession from the state that the evidence was exculpatory would in itself be exculpatory and deemed comparable evidence. Without the evidence, a defendant will necessarily fail one of the two requirements under *Trombetta*. Such an impossible burden is fundamentally unfair and is in itself a violation of due process of law.

This Court should also grant certiorari to prevent

the application of such a fundamentally unfair standard in this and future cases. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Trombetta*, 467 U.S. at 485. Due process demands that defendants are given a "fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). Under the Sixth Amendment, defendants have a right to effective cross examination and compulsory process. U.S. Const. Amend. VI. Defendants also have a right to call their own expert witnesses and cross examine the state's witnesses. *See, Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415. U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). It is fundamentally unfair and a denial of due process to permit the state to knowingly destroy evidence necessary to present a complete defense.

Part of the foundation for this Court's decision in *Trombetta* was that defendants had alternative means of challenging the breath test results. 467 U.S. at 490. Defendants could raise the issues of faulty calibrations, extraneous interference with machine measurements, and operator error to attack the reliability of the machine. *Id.* The defendants "could have utilized these data to impeach the machine's reliability" without resort to a preserved breath sample. *Id.* In this case, the state blocked access to evidence to prove if and when any of these problems happened.

This Court cited advancements in technology that increased the confidence in the results of breath testing devices as a reason for not requiring the state to preserve a sample of the defendant's breath. *Id.* at 489. Similar advances in technology created an Intoxilyzer with a memory. That memory can be used as a quality control tool to ascertain if such confidence in the results is warranted. RT 12/11/00 at

77. The state steadfastly refuses to allow the Petitioners to use this quality control tool.

Defendants should not have to rely on the subjective interpretation and selective reporting of data. Peer review is a component of good science. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 593 (1993). Peer review includes "jealous checking" of other's work including an analysis of errors. KENNETH R. FOSTER, PETER W. HUBER, JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS 166-8 (1997). Failing to report data that is necessary to fairly evaluate one's work is scientific misconduct. *Id.* at 96. In regulatory fields where accuracy and reliability are critical, scientific research and results must conform to strict quality control measures which include extensive documentation of raw data and the use of independent auditors. *Id.* at 101, 174. "[T]he obligation of scientists to carry out an investigation of the potential errors in their work is [] very clear. A scientist's failure or unwillingness to directly contradict potential errors in his or her own work is almost conclusive proof, in and of itself, that the work is flawed." *Id.* at 83.

It is repugnant to the concept of justice and fundamentally unfair to permit the state to introduce a scientific result at trial that is based on certain assumptions and to prohibit access to information that can prove whether those assumptions are true or not. The evidence presented to the trial court clearly established that the state's assumptions are not always true. Mere speculation that various things could affect a defendant's breath test is a poor substitute for actual proof. The integrity of the state's best evidence of guilt may be unimpaired in most cases. Nonetheless, the general reliability of the device does not justify the concealment of information that can prove that results in some cases are unreliable.

Criminal trials are a search for the truth. Our rules of evidence seek "[t]he promotion of growth and development of the law of evidence to the end that the truth may be

ascertained and proceedings justly determined." Rule 102, Ariz.R.Evid., FED. R. EVID. 102. That end is thwarted when the state engages in a calculated effort to avoid its disclosure obligations and to permit the systematic destruction of evidence necessary to provide defendants with a meaningful opportunity to present a complete defense.

II. COURTS HAVE RENDERED CONFLICTING INTERPRETATIONS OF *ARIZONA v. YOUNGBLOOD*, 488 U.S. 51 (1988), AND *CALIFORNIA v. TROMBETTA*, 467 U.S. 479 (1984).

This Court should also grant Certiorari to resolve conflicting interpretations of *Trombetta* and *Youngblood* among various appellate courts. This Court never qualified the term "exculpatory value" when stating, "[t]he presence or absence of bad faith by the police for purpose of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." 488 U.S. at n.56. Consequently, courts are left without guidance as to how to apply the standards enunciated in *Trombetta* and *Youngblood*. Several separate and distinct standards of what the defendant must prove in order to establish a due process violation under the Fourteenth Amendment exist in the wake of *Youngblood*.

The first interpretation is that *Trombetta* and *Youngblood* are separate and distinct tests. These cases distinguish *Trombetta's* two element definition of constitutional materiality from *Youngblood's* requirement that the defendant prove bad faith destruction of "potentially useful" or "potentially exculpatory" evidence. *United States v. Bohl*, 25 F.3d 904, 909-10 (10th Cir. 1994); *Cooper v. Calderon*, 255 F.3d 1104, 1114 (9th Cir. 2001); *Bullock v. Carver*, 297 F.3d 1036, 1056 (10th Cir. 2002); *United States v. Sullivan*, 919 F.2d 1403, 1426-7 (10th Cir. 1991); *United States v. Gomez*, 191 F.3d 1214, 1218-9 (10th Cir. 1999); *United States v. Richard*, 969 F.2 849, 853 (10th Cir. 1992); *United States v. Parker*, 72 F.3d 1444, 1451-2 (10th Cir. 1995);

United States v. McClelland 141 F.3d 967, 971 (10th Cir. 1998); *United States v. Wright*, 260 F.3d 568, 570-1 (6th Cir. 2001).

These cases find that the test under *Trombetta* for constitutional materiality is a higher burden than for potentially exculpatory or potentially useful evidence and therefore does not require proof of bad faith. *Bohl*, 25 F.3d at 909-10; *Wright*, 260 F.3d at 571; *Cooper v. Calderon*, 255 F.3d at 1114; *Bullock v. Carver*, 297 F.3d at 1056; *Sullivan*, 919 F.2d at 1426-7; *Richard*, 969 F.2d at 853; *Parker*, 72 F.3d at 1451-2; *McClelland*, 141 F.3d at 971. "The destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith." *Wright*, 260 F.3d at 571.

These cases interpret *Youngblood* as applying to cases where the evidentiary value of the lost evidence is not known with certainty and is merely "potentially useful" or "potentially exculpatory". *Bohl*, 25 F.3d at 910; *Wright*, 260 F.3d at 571; *Bullock v. Carver*, 297 F.3d at 1056; *Gomez*, 191 F.3d at 1218-9; *Richard*, 969 F.2 at 853; *Parker*, 72 F.3d at 1452; *McClelland* 141 F.3d at 971.

One view of the value of the evidence in *Youngblood* claims is that the defendant need *only* prove that the evidence was "potentially useful" or "potentially exculpatory." *Bohl*, 25 F.3d at 910. "[T]o trigger the *Youngblood* test, all that need be shown is that the government destroyed potentially useful evidence." *Id.* (internal quotation and citation omitted). That standard is met if a "reasonable possibility that further tests might have produced material exonerating evidence." *Id.*; *Gomez*, 191 F.3d at 1214.

Some of these cases strictly follow the *Youngblood* analysis that the potential to exculpate the defendant is completely inferred from the bad faith of the government. *Bohl*, 25 F.3d at 910-911; *Cooper v. Calderon*, 255. F.3d at 1114. Others find that the bad faith analysis is interrelated with the apparent value at the time of the destruction. *Wright*, 260 F.3d at 571.

A second category of cases interprets *Youngblood* and *Trombetta* as the same test, but requires a less strict showing of materiality for cases under *Youngblood*. *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993); *United States v. Dring*, 930 F.2d 687 (9th Cir. 1991); *United States v. Chaparro-Alcantra*, 226 F.3d 616 (7th Cir. 2000); *United States v. Jobson*, 102 F.3d 214 (6th Cir. 1996).

Under this view, the materiality requirement in *Trombetta* is interpreted to mean that it must have been apparent that the evidence was *potentially* exculpatory prior to being destroyed. *Cooper*, 983 F.2d at 931. Support for such a conclusion stems from this Court's language in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). "In making such a determination, courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself." 458 U.S. at 874. This Court indicated that all that is necessary is a "plausible showing" that the evidence would be material and favorable. *Id.* at 873. Sanctions are appropriate if a "reasonable likelihood" that the evidence "could have affected the judgement of the trier of fact." *Id.* at 873-4.

Actual knowledge of whether the evidence would have proven exculpatory is not required. Rather, the apparent exculpatory value necessary under *Trombetta* is met when the defendant proves that the state destroyed evidence in bad faith that the state knew had the potential to exculpate the defendant. *Cooper*, 983 F.2d at 931. A possibility beyond mere speculation that the evidence was exculpatory is required. *Jobson*, 102 F.3d at 218-19.

The third category of cases interprets *Youngblood* as clarifying that bad faith is an additional requirement to *Trombetta's* two-pronged constitutional materiality test. *Dibenedetto v. Hall*, 272 F.3d 1, 12-13 (1st Cir. 2001); *United States*

v. Femia, 9 F.3d 990, 993-4 (1st Cir. 1993); *Jones v. McCaughrtry*, 965 F.2d 473, 477-9 (7th Cir. 1992); *Henry v. Page*, 223 F.3d 477, 480-81 (7th Cir. 2000). These cases imply that the same strict materiality analysis enunciated in *Trombetta* applies by failing to explain or qualify how that standard applies to potentially exculpatory evidence.

Under this view, "potentially exculpatory" evidence always fails *Trombetta's* materiality requirement because the actual exculpatory value is not apparent without further testing or analysis, and therefore sanctions are inappropriate. *See, Dibenedetto v. Hall*, 272 F.3d at 12-13. None of these cases apparently taking this view, however, explicitly state that potentially exculpatory evidence cannot result in sanctions under the Due Process Clause as the Arizona Court of Appeals did in this case.

III. THE OPINION OF THE ARIZONA COURT OF APPEALS PERMITS AND ENCOURAGES THE BAD FAITH DESTRUCTION OF POTENTIALLY EXCULPATORY EVIDENCE.

This Court should also grant the Writ for a Petition of Certiorari because the Opinion of the Arizona Court of Appeals insulates the state from sanctions if evidence is successfully destroyed. The opinion of the Arizona Court of Appeals will allow the police in Arizona to destroy evidence with impunity. It will encourage the state to systematically eliminate access to information that has little value to the state, but great value to innocent defendants. This danger is especially real in driving under the influence cases. The Arizona Court of Appeals claimed that the opinion was not intended to approve of the destruction or loss of exculpatory information, but the holding explicitly did exactly that. App. A. at 14a. This Opinion imposes the wrong standard of law and approves of the destruction of the very evidence the Arizona Court of Appeals finds necessary to prove a denial of due process of law.

IV. THE TRIAL COURT CORRECTLY SANCTIONED THE STATE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT FOR PERMITTING, IN BAD FAITH, THE DESTRUCTION OF POTENTIALLY EXCULPATORY EVIDENCE.

This Court should also grant certiorari because under the correct standard of law the Petitioners in this case clearly established a violation of the Due Process Clause of the Fourteenth Amendment. The Petitioners established that the evidence is potentially exculpatory and that the state acted in bad faith. This Court should also grant certiorari because *Youngblood* did not squarely address the appropriate sanction in cases where potentially exculpatory rebuttal evidence is lost or destroyed in bad faith. In this case, the state destroyed "raw data" that the Petitioners could have used to impeach the breath tests that the state intends to use at trial. *See*, 467 U.S. at 487-8. This Court has twice stressed the importance of whether the state used the lost or destroyed evidence. *Id.*; 488 U.S. at 56. In this case, the trial court correctly determined that dismissal is an appropriate sanction for the state's intentional loss or destruction of impeachment evidence.

The Petitioners clearly established that problems that impact the reliability of breath results are found in the ADAMS database that cannot be otherwise be discovered. RT 12/11/00 at 22-5, 37, 40, 44, 46-7. The Petitioners also clearly established that paper records which should be kept are not always preserved or disclosed. *Id.* at 25-70, 76, 104, 109, 119, 134-5. When paper records are not disclosed, the ADAMS data is the only way to identify numerous problems that impact the reliability of the device. *Id.*

Implicit in the decision of the Court of Appeals is a faulty assumption that there is another realistic means of proving the loss or destruction of exculpatory maintenance logs, calibration checks, or error information. App. A. at 13a-

14a. Admissions by the police to destruction of such records are highly unlikely given the state's interest in prosecuting DUI cases and that the destruction, mutilation, alteration, removal, secretion, or concealment of evidence or public records is a felony under A.R.S. §§13-2407, 13-2809, and 38-421.

The Arizona Court of Appeals erroneously placed great emphasis on the fact that the expert witness called by petitioners could not identify an inaccurate subject test by using the ADAMS data. App. A. at 10a, 11a. The ADAMS data can never identify an inaccurate subject test because the expected value is unknown and no breath sample is preserved. The ADAMS data does detect results that are unreliable. RT 12/11/00 at 24, 34, 38, 46, 53-55, 57, 58, 60, 65, 67, 68, 70, 75, 77, 85, 92, 97, 104, 134-5. The Arizona Court of Appeals failed to address the reliability of the results and chose to focus again on the petitioners' inability to prove the unprovable.

The trial court found that the evidence in this case was at least potentially exculpatory because ADAMS data from other jurisdictions contained otherwise undiscoverable evidence consisting of failed calibration tests and errors that mandate that the device be removed from service and repaired. App. B at 3b-7b. The trial court then applied the correct standard of law under *Youngblood* and correctly focused on the evidence of the state's bad faith in failing to disclose the information. *Id.* at 7b. The trial court, in finding bad faith, took into consideration the unique and repetitive nature of DUI cases, the previous refusal to disclose the information, the lack of credibility or validity in the state's excuses for failing to disclose the data, and the fact that the state was on notice that the ADAMS data may contain exculpatory information. *Id.* at 3b-7b.

The conduct of the state clearly indicated that the evidence could form the basis for exonerating the petitioners. *See, Youngblood*, 488 U.S. at 58. This was not an isolated failure

to preserve evidence. It was a calculated effort to circumvent disclosure obligations. *See*, 467 U.S. at 488. The trial court dismissed the state's assertions that meeting the minimum statutory foundational requirements assures accurate results and found that the Due Process Clause allows a defendant to challenge the state's evidence with relevant information. App. B at 8b.

The importance of the information sought in this case is illustrated in *State v. Meza*, 50 P.3d 407, 203 Ariz. 50 (July 2, 2002), which reached an opposite conclusion regarding the importance of the ADAMS information and the necessity of disclosing it. In *Meza*, the defendant fortuitously discovered from another case that the state had not only failed to disclose an out of tolerance calibration check, but had unsuccessfully attempted to delete all records of its existence from the ADAMS database. *Id.* at 409-11. The Court of Appeals sanctioned the state for "[i]nstituting an unwritten, rogue practice of deleting evidence of failed calibration checks; withholding evidence from the prosecution, the defendant, and the court; misleading the court in testimony under oath." *Id.* at 414. The court explained that:

> [A]n essential purpose of the regulatory scheme and the ADAMS/ACJIS recording system is to preserve, and permit examination of, the data that will permit independent verification of the accuracy of breath-testing devices. By requiring transparency of testing and comprehensiveness of data, Arizona seeks to instill confidence in the accuracy of those devices, not only among participants in the criminal justice system, but among the general public as well.
>
> This purpose has been thwarted, and confidence undermined, by the deletion practices that the trial court confronted in this case. And even if we assume that the Crime Lab's

> practices were well-intended and that the objective was only to delete tests that participating crime Lab employees honestly believed were unreliable and might unnecessarily impugn the accuracy of the machine, this was not a judgement that was theirs to make. At bottom, they engaged in the secretion or attempted destruction of inconvenient evidence – evidence that should have been available for independent evaluation by prosecutors, criminal defendants, and the courts.

Id. at 413. The DPS was integrally involved in such practices. *Id.* The discovery of this abhorrent level of deception in *Meza* was made possible exclusively by the presence of the ADAMS database. *Id.* at 411. The finding in *Meza* is wholly inconsistent with the finding in this case that the information is not exculpatory or material. This inconsistency was left unresolved by the Arizona Supreme Court when it denied the petition for review in this case. App. D.

Throughout this case, the Respondent has claimed that the ADAMS data is useless, immaterial, irrelevant, and can not be used to impeach the reliability of the breath test results. *See*, ROA 20 *passim*; ROA 63 *passim*; ROA 81 *passim*; Appellant's Opening Brief *passim*; Appellant's Reply Brief *passim*; Response to Petition for Review *passim*. If these claims are true, the state should be eager to preserve and disclose the ADAMS data as additional evidence that the breath results are reliable. However, the state's actions, or lack thereof, speak louder than its words. Those actions scream that the state knows and fears that information will make obtaining convictions more difficult or even impossible in some cases.

The evidence presented to the trial court and discovered in *Meza*, 50 P.3d 407, make it clear that the state knows that ADAMS data will be useful and that it will take extraordinary efforts to prevent discovery of that information. The bad faith of the state in this case clearly indicates

that the ADAMS data could form the basis for exonerating the Petitioners and therefore due process demands that the state be sanctioned under *Youngblood*.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 21st day of May, 2003.

/s/
DEAN J. BRAULT
Assistant Pima County Public Defender
32 N. Stone, 4th Floor
Tucson, Arizona 85701
Telephone No. (520) 740-5300
ATTORNEY FOR PETITIONERS

APPENDIX A

The STATE of Arizona, *Appellant,*	)
vs.	)
Terry Lynn O'DELL; Marcos T. Poblete; William W. Morgan; Miguel Canedo Avilez; Ike Paul Jimmerson; Freddy E. Martinez; Eugene A. Vasquez; Rigoberto Lujan, Jr.; and Reginald C. Johnson, *Appellees.*	)

CASE NO. 2 CA-CR 2001-0031, 2 CA-CR 2001-0163, 2 CA-CR 2001-0164, 2 CA-CR 2001-0166, 2 CA-CR 2001-0167, 2 CA-CR 2001-0168, 2 CA-CR 2001-0169, 2 CA-CR 2001-0177, 2 CA-CR 2001-0190.

COURT OF APPEALS OF ARIZONA, DIVISION 2, DEPARTMENT B.

May 30, 2002.

Barbara LaWall, Pima County Attorney, by Elizabeth Hurley and Bradley Roach, Tucson, for Appellant.

Susan A. Kettlewell, Pima County Public Defender, by Dean J. Brault, Tucson, for Appellees O'Dell, Poblete, Morgan, Avilez, Jimmerson, Martinez, Lujan, and Johnson.

Zohlmann Law Offices, by Robert J. Zohlmann, Amado, for Appellee Vasquez.

OPINION

HOWARD, Presiding J.

¶ 1 The superior court dismissed with prejudice charges of driving under the influence of an intoxicant (DUI) and driving with a blood alcohol content (BAC) of .10 or more against appellees, Terry L. O'Dell; Marcos T. Poblete; William W. Morgan; Miguel C. Avilez; Ike P. Jimmerson; Freddy E. Martinez; Eugene A. Vasquez; Rigoberto Lujan, Jr.; and Reginald C. Johnson (collectively "O'Dell"), after consolidating their cases. The court found that the state's failure to preserve and disclose memory data from the intoxilyzer used to determine their BAC violated Rule 15.1, Ariz.R.Crim.P., 16A A.R.S., the federal and state due process clauses, and the requirement of statewide uniformity for BAC testing. Because the record fails to support the superior court's factual findings and because we disagree with its conclusions of law, we vacate the trial court's order of dismissal and remand for further proceedings.

FACTUAL BACKGROUND

¶ 2 We view the facts in a light most favorable to sustaining the trial court's dismissal. *State v. Rasch*, 188 Ariz. 309, 312, 935 P.2d 887, 890 (App.1996). The state uses the Intoxilyzer 5000 to test DUI suspects' breath for the presence of alcohol. Before and after a completed breath test of any DUI suspect, the intoxilyzer automatically runs "concurrent" calibration checks to test its own accuracy. To operate, the machine also requires that two individual breath measurements, or "subject tests," be taken between five and ten minutes apart, with results that are within .02 of each other. Additionally, every thirty-one days a routine calibration test is conducted, and every ninety days a quality assurance test is conducted. Further, the state keeps a service log for repairs

to the intoxilyzer. If the intoxilyzer detects an error on a subject test, it "flags" the error and prints a card reporting the error, and the suspect is retested. After each completed breath test, the suspect is given a breath test card printed from the intoxilyzer's memory, which includes results from both subject tests and the concurrent calibration tests. The suspect is also provided with the results of the thirty-one-day calibration testing and ninety-day quality assurance testing.

¶ 3 Unlike earlier models of intoxilyzers, which contained only enough memory to store data from a single completed test so that the breath card could be printed, the Intoxilyzer 5000 has sufficient memory to retain data from multiple completed breath tests, calibration checks, and quality assurance procedures, as well as other data. Its memory, however, can store data from only one hundred completed breath tests. And, when the memory is full, new data begins to overwrite the oldest data.

¶ 4 Police can electronically transfer the data from the memory through dedicated telephone lines and a modem to Arizona Department of Public Safety (DPS) computers in Phoenix crime laboratories equipped with the Alcohol Data Acquisition Management System (ADAMS), a software database and communication package. After being transferred, the data can be sent to an Arizona Criminal Justice System mainframe computer, where it could be accessible to DUI defendants as an ADAMS report. While some law enforcement jurisdictions in the state routinely transfer the Intoxilyzer 5000 data and provide ADAMS reports to DUI defendants, Pima County has not installed the modem required to connect with the DPS mainframe and does not transfer the data. Therefore, although DUI defendants in Pima County have access to the paper records from their respective breath tests, the state cannot provide them access to ADAMS data from any other breath tests.

PROCEDURAL BACKGROUND

¶ 5 O'Dell and the other appellees were charged in Pima County Superior Court with DUI and/or driving with a BAC of .10 or more.[1] The state disclosed O'Dell's breath test card, which included the concurrent calibration checks and O'Dell's test results, and also disclosed results from the thirty- one-day calibration checks and the ninety-day quality assurance test. However, in keeping with routine procedure, the intoxilyzer memory, which contained data from O'Dell's breath test and other individual breath tests which preceded and followed O'Dell's, was not electronically transferred. Accordingly, this data was eventually overwritten in the intoxilyzer memory.

¶ 6 In a "Motion for Disclosure" filed pursuant to Rule 15.1, Ariz.R.Crim.P., and an additional motion for sanctions, O'Dell moved to suppress his breath test results and dismiss his case, arguing the state impermissibly had allowed the data in the memory of the intoxilyzer used for his breath test to be erased. The court consolidated the other appellees' cases with O'Dell's for the limited purpose of resolving this issue.[2] In his motions, O'Dell argued that his breath test results should be suppressed and his case dismissed because the intoxilyzer data was exculpatory and the state was

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1 These DUI charges were filed in superior court because they were felony aggravated DUI or BAC charges, or they accompanied various felony charges such as aggravated assault.

2. Appellee Vasquez contends separately that, because the state did not file or serve on him a Notice of Appeal pursuant to Rule 31.3, Ariz.R.Crim.P., the state's appeal should be dismissed as to him. But the caption number for his case appeared on the court's judgment, and the state's timely filed Notice of Appeal included the judgment caption number for the consolidated case, thereby vesting jurisdiction in this court. *See State v. Smith*, 171 Ariz. 501, 503, 831 P.2d 877, 879 (App.1992). And, Rule 31.2(f)(2) imposes the duty of service on the clerk of the trial court. Finally, Vasquez has not claimed he was unaware of the state's appeal and has claimed no prejudice. *See Smith*. Accordingly, we reject his contention.

required to disclose it under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He further argued that dismissal was required because the state had acted in bad faith in failing to preserve the data. The state responded that neither preservation nor disclosure of the data was necessary because it was not exculpatory. It also contested the claim of bad faith.

TRIAL COURT'S RULING

¶ 7 After the hearing, the trial court, in its minute entry dismissing O'Dell's case, entered factual findings and legal conclusions,[3] including the fact that the intoxilyzer data was exculpatory "as a whole" and that the state had violated Rule 15.1, Ariz.R.Crim.P., and *Brady* in failing to preserve it. The court further concluded that dismissal was required under *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), and *State v. Youngblood*, 173 Ariz. 502, 844 P.2d 1152 (1993), because the state had acted in bad faith when it "intentionally or at least knowingly allowed evidence that is, in general terms, clearly exculpatory to be systematically destroyed." The state appeals the trial court's ruling.

¶ 8 "Generally, a trial court's ruling on a motion to dismiss the indictment or to suppress evidence will not be overturned absent an abuse of discretion." *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, ¶ 9 (App.2000). We defer to the trial court's factual findings unless clearly erroneous. *Mack v. Cruikshank*, 196 Ariz. 541, ¶ 6, 2 P.3d 100, ¶ 6 (App.1999). But we are not bound by its legal conclusions. *State v. Hackman*, 189 Ariz. 505, 508-09, 943 P.2d 865, 868- 69 (App.1997). We also review any due process claims de novo. *Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, ¶ 9.

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3 The trial court essentially adopted O'Dell's proposed findings of fact and conclusions of law.

RULE 15.1(e)

¶ 9 The trial court based the dismissal, in part, on Rule 15.1(e), Ariz.R.Crim.P., which provides as follows:

> Upon motion of the defendant showing that he or she has substantial need in the preparation of his or her case for additional material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to him or her. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

This rule does not, by its own terms, provide for dismissal. And the record in this case contains no prior order requiring any additional disclosure. Consequently, the trial court could not dismiss the case against O'Dell without having entered a prior order with which the state had failed or refused to comply.[4] *See* Rule 15.7, Ariz.R.Crim.P. (providing for sanctions for failure to disclose). Furthermore, although O'Dell moved for "disclosure" under Rule 15.1(e), the intoxilyzer data no longer existed, a fact that O'Dell acknowledged in his disclosure motion. Rule 15.1(e) simply cannot apply to evidence that no longer exists. Accordingly, the trial court improperly dismissed the charges under Rule 15.1(e).

BRADY

¶ 10 The trial court further dismissed the charges pursuant to *Brady*, and under Rule 15.1(a)(7), Ariz.R.Crim.P.,

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[4] The question of whether a trial court could order disclosure of the intoxilyzer memory under Rule 15.1(e) in any particular DUI case is not before us.

which codifies *Brady*. *See* Ariz.R.Crim.P. 15.1(a)(7), cmt. *Brady* is rooted in the due process clause and its purpose is to protect a defendant's "right to a fair trial by ensuring the reliability of the verdict against him." *United States v. Coppa*, 267 F.3d 132, 138 (2nd Cir.2001). Under *Brady*, the state is required to disclose all plainly exculpatory evidence within its possession and violates due process if it fails to do so, irrespective of its good or bad faith. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218; *see also Arizona v. Youngblood*, 488 U.S. at 57, 109 S.Ct. at 337, 102 L.Ed.2d at 289; *State v. Youngblood*, 173 Ariz. at 506, 844 P.2d at 1156.

¶ 11 As O'Dell stated in his motion for disclosure and as the court itself recognized, the state had not preserved the intoxilyzer data. Hence, the state did not violate *Brady* by failing to disclose evidence it no longer had. And the state had never possessed the data in any useable form. Moreover, the remedy for a *Brady* violation is a retrial, not dismissal, since *Brady* presupposes the exculpatory evidence still exists. *See State v. Youngblood*, 173 Ariz. at 506, 844 P.2d at 1156; *see also United States v. Dumas*, 207 F.3d 11, 15 (1st Cir.2000) (*Brady* addresses only "exculpatory evidence that is still in the government's possession"). Ultimately, neither *Brady* nor Rule 15.1(a)(7) supports dismissal in this case.

YOUNGBLOOD

¶ 12 The trial court also dismissed the case pursuant to *Arizona v. Youngblood* and *State v. Youngblood*, which apply to cases in which the evidence in controversy no longer exists. Under such circumstances, due process is violated only if a defendant shows the state had acted in bad faith in failing to preserve the evidence. Arizona v. Youngblood 488 U.S. at 57-58, 109 S.Ct. at 337, 102 L.Ed.2d at 289; *State v. Youngblood*, 173 Ariz. at 508, 844 P.2d at 1158. In the due process context, a determination of bad faith " 'must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.' " *State v. Walker*, 185 Ariz. 228, 238, 914 P.2d 1320, 1330 (App.1995), *quoting* *Arizona v.*

Youngblood, 488 U.S. at 56 n., 109 S.Ct. at 336 n., 102 L.Ed.2d at 288 n.; see also State v. Dunlap, 187 Ariz. 441, 452, 930 P.2d 518, 529 (App.1996) (state must preserve only evidence that could be expected to have significance in suspect's defense).

¶ 13 The mere possibility that destroyed evidence could have exculpated a defendant is insufficient to establish a due process violation, as there has been no showing of prejudice to the defendant. *Arizona v. Youngblood*, 488 U.S. at 56 n., 109 S.Ct. at 336 n., 102 L.Ed.2d at 288 n.; *State v. Youngblood*, 173 Ariz. at 507, 844 P.2d at 1157; *Walker*, 185 Ariz. at 238, 914 P.2d at 1330. If the state fails to preserve evidence that has not been tested and only might have been exculpatory, the evidence is not constitutionally material and no prejudice can be shown. *See Arizona v. Youngblood; State v. Youngblood.*

¶ 14 The trial court found that "data from the ADAMS system has proven that particular test results are unreliable where paper records indicated no problem with the reliability of the results." It concluded that the state therefore had acted in bad faith under *Arizona v. Youngblood* and *State v. Youngblood* by knowingly "allow[ing] evidence that is, in general terms, clearly exculpatory to be systematically destroyed."

a. Flaxmayer Testimony

¶ 15 At the hearing, Chester Flaxmayer, a self-employed criminalist, testified as an expert on behalf of O'Dell. Familiar with the Intoxilyzer 5000 and having worked with its ADAMS data in other state law enforcement jurisdictions, Flaxmayer stated:

> I have personally seen instances where according to the paper records the intoxilyzer was working but the [ADAMS] data base shows either that the instrument was not working, that it had malfunctioned and broken in between those paper records. I've seen instances where [those operating the intoxi-

> lyzer] made mistakes, where there were other tests on defendants that were not reported. Basically just about any mistake a human can make you can find an example of in a database.

¶ 16 Flaxmayer elaborated further on the alleged inability of a paper record to truly reveal intoxilyzer errors. He stated that the Intoxilyzer 5000 detects and flags "mouth alcohol," which could distort test results, but that sometimes the paper record of a test in which that occurred is no longer available for unknown reasons. The mouth alcohol error is, however, noted on the card of the person tested. Additionally, he discussed operator errors, such as misinterpreting an event, allowing the suspect to blow at the wrong time, pressing the wrong button, or causing interference by transmitting on a nearby radio during testing. He stated he had seen instances where one of these errors had occurred, but an operator reported that nothing had happened or misinterpreted what had happened. Notwithstanding his testimony that these errors might not be accurately reported from other suspects' tests, he agreed these operator errors are all detected and flagged by the intoxilyzer and reported in some manner on the card of the suspect actually taking the test.

¶ 17 Another error Flaxmayer discussed was an operator's failure to check the hose to ensure it was warm enough to prevent condensation. Condensation in the hose lowers the reading, but condensation in the chamber could raise the reading. According to Flaxmayer, a paper record would establish when the hose was replaced, but not when it broke. Flaxmayer also stated he was concerned about "unstable reference," a problem that should result in the removal of the intoxilyzer from service. Where unstable reference occurs, a paper form reporting this should be filled out. Although Flaxmayer stated that he had seen instances in which a quality assurance report had failed to report unstable reference, he also acknowledged that unstable reference errors, when occurring during a test, would appear on the suspect's test

card, and on the thirty-one-day and ninety-day test results, if occurring at those times as well.

¶ 18 Flaxmayer also testified about "interference subtraction," which could also result in inaccurate test results. But he stated this would be flagged by the intoxilyzer, and acknowledged that the ADAMS data would not give any information in addition to that which was already contained in a paper record. Flaxmayer also testified that when the intoxilyzer solution is changed and gives high readings, if the solution is correct, the intoxilyzer could be out of calibration and in need of repair. Although Flaxmayer stated such a problem could appear in the ADAMS data, he also stated that such information would be contained in paper records. Ultimately he stated he had seen only six instances in his database where such a problem could have occurred, adding that the intoxilyzer would fail the thirty-one-day calibration test it this problem had occurred.

¶ 19 Notwithstanding his endorsement of preserving the Intoxilyzer 5000 data and his attempt to show the defects of paper records, Flaxmayer conceded that errors would not necessarily change the accuracy of the suspect's test, would not be recorded in the ADAMS data, or would not be helpful in determining the reliability of the particular suspect's test results. He also agreed that, while he would prefer to have access to the data, if the thirty-one-day and ninety-day test results did not reveal any problems and there were no maintenance problems in between, he would "believe [the intoxilyzer] to be working" on the subject tests. And, most importantly, Flaxmayer admitted that despite having as many as 80,000 tests in his data base, he could not report one inaccurate result when the concurrent calibration checks were within standard and proper procedures had been followed.

b. Analysis

¶ 20 The trial court found that the ADAMS data showed the intoxilyzer results were unreliable in particular

tests, but made no findings with regard to O'Dell's test. And because Flaxmayer made no attempt to connect any of the intoxilyzer errors he discussed to O'Dell's case, his testimony would not support a finding of unreliability with regard to O'Dell. Further, the record is devoid of evidence that any paper records or maintenance logs were not preserved or that operators had misinterpreted any events with regard to O'Dell. Additionally, according to Flaxmayer's testimony, any errors that reasonably could have affected the accuracy of O'Dell's test would have been reported on his test card or indicated somewhere in the paper record. Essentially, Flaxmayer's testimony consisted largely of generalities and was, at times, speculative, as evinced by the fact he could not cite one example in which the concurrent calibration checks on a test were within standard and the test had been inaccurate. Accordingly, his testimony was insufficient for the trial court to find that the lost ADAMS data was exculpatory under *Youngblood.*

¶ 21 Because the record fails to support a finding that the ADAMS data was exculpatory in this case, the trial court improperly concluded that the state had acted in bad faith under *Arizona v. Youngblood* and *State v. Youngblood. See Walker* (bad faith depends on knowledge of exculpatory nature of evidence at time of destruction). Flaxmayer's testimony failed to demonstrate the ADAMS data would show any problem had occurred on O'Dell's test. Furthermore, he could not identify one test result out of nearly 80,000 in which the concurrent calibration and other routine tests were within standards, but the result was inaccurate. Thus, the chances are extremely low that the ADAMS data would have been exculpatory. *See California v. Trombetta,* 467 U.S. 479, 489, 104 S.Ct. 2528, 2534,81 L.Ed.2d 413, 422 (1984) (lost evidence with "extremely low" possibility of exculpating defendant not constitutionally material). And, finally, the state was acting in accordance with its standard procedure which complied with all Department of Health Services (DHS) regulations. Accordingly, we disagree with the trial court's conclusion of bad faith. *See Trombetta; Dunlap; Walker.*[5]

OTHER CASES

¶ 22 The trial court relied on other Arizona cases to further support its ruling. First, relying on *State ex rel. McDougall v. Superior Court*, 181 Ariz. 202, 888 P.2d 1389 (App.1995) and *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (App.1993), the trial court concluded that dismissal was proper because "Arizona case law mandates that persons accused of DUI have an opportunity to rebut the prima facie showing that an intoxilyzer" was operating correctly and to attack the intoxilyzer's reliability before the jury.

¶ 23 But these cases are actually favorable to the state, both establishing limitations on the state's obligations in a DUI case in light of the reliability of the Intoxilyzer 5000. *See Moss*, 175 Ariz. at 353, 857 P.2d at 405 ("The Intoxilyzer 5000 is a very accurate and reliable testing method with built-in safeguards."). And, although the court stated in *McDougall* that a defendant may subpoena "any ... evidence that potentially could rebut" the state's prima facie showing, *id.* at 206, 888 P.2d at 1393, that is a far cry from the conclusion that the state is required to preserve evidence in a particular form. Additionally, because the evidence here has been lost by being overwritten in the intoxilyzer memory, it is more appropriate that we look todecisions on lost evidence to determine if a due process violation has occurred. Finally, as the state points out, the evidence discussed in DUI case law before the introduction of the Intoxilyzer 5000 memory remains available to defendants today. Accordingly, neither *McDougall* nor *Moss* supports the trial court's dismissal.

¶ 24 The trial court also concluded that preservation of the ADAMS data was necessary to comport with "[t]he

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[5] O'Dell also suggests we apply a balancing test in this analysis. Under a balancing test, O'Dell could show that the state could preserve the intoxilyzer memory at minimal expense. But our supreme court has expressly rejected the balancing test in this context. *State v. Bocharski*, 200 Ariz. 50, ¶¶ 42-43, 22 P.3d 43, ¶¶ 42-43 (2001); *State v. Youngblood*, 173 Ariz. 502, 844 P.2d 1152 (1993).

policy concern of statewide uniformity in the administration of breath testing" under *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983). In *Fuenning*, our supreme court held that, based on statute and in the interest of uniformity, the state must produce foundational evidence that standard statewide procedures adopted by DHS have been followed. O'Dell argues that because law enforcement jurisdictions in Maricopa County disclose the ADAMS data, *Fuenning* requires that all Arizona jurisdictions do the same. But O'Dell has not shown that the state failed to comply with any statute, regulation, or foundational requirement. And, he has not demonstrated that any statute or department of the statehas dictated that agencies capture and disclose the ADAMS data. Accordingly, *Fuenning* is inapposite.

¶ 25 O'Dell also argues that the unique nature of DUI cases justifies finding a due process violation here. He correctly notes that several cases have established special affirmative duties on behalf of the state in the DUI context.[6] But these are exceptions to the general rule, declared by our supreme court, that the state is not required to gather exculpatory evidence on a defendant's behalf. *See Montano v. Superior Court*, 149 Ariz. 385, 390-91, 719 P.2d 271, 276-77 (1986). Unless the supreme court expands the DUI exception in this context, we are bound by prior cases refusing to impose such a duty on the state.

CONCLUSION

¶ *26 Brady, Arizona v. Youngblood*, and their progeny simply do not require suppression of BAC test results and dismissal of DUI charges due to the routine purging of the Intoxilyzer 5000 memory data. Interpreting these cases too broadly could conceivably deter the state from improving intoxilyzer technology. By our ruling in this case, we are not deciding

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[6] *State ex rel. Dean v. City Court*, 163 Ariz. 510, 789 P.2d 180 (1990); *State v. Velasco*, 165 Ariz. 480, 799 P.2d 821 (1990); *Montano v. Superior Court*, 149 Ariz. 385, 719 P.2d 271 (1986); *Scales v. City Court*, f2 122 Ariz. 231, 594 P.2d 97 (1979); *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979).

what the result should be in a case in which maintenance logs or other records indicate there has been a problem with a given intoxilyzer machine that may have affected the accuracy of test results obtained through the use of that machine. Nor should our decision be construed as approving of the destruction or loss of any exculpatory maintenance logs or error information. And we are not denying that in an appropriate case, an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), may be warranted. But, because the state is under no federal or state statutory or due process obligation to preserve the Intoxilyzer 5000 data, and because there was an insufficient showing here that the data contained exculpatory evidence, the trial court erred in dismissing the prosecution.

¶ 27 The trial court's ruling is vacated, and we remand for further proceedings.

CONCURRING: PHILIP G. ESPINOSA, Chief Judge, and WILLIAM E. DRUKE, Judge.

APPENDIX B

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
January 25, 2001 (9:56 a.m.)
By: Karen Phillips

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CHARLES S. SABALOS

CASE NO.	C-20003031	CR-2002900
	CR-65200	CR-66089
	CR-66988	CR-67334
	CR-67651	CR-67864

COURT REPORTER: NONE DATE: January 25, 2001

C-20003031

JOSE SANTIAGO ESPINOZA,
et al.,

vs.

HON. JACK PEYTON

STATE OF ARIZONA

VS.

RIGOBERTO LUJAN, JR. (CR-20002990)
MARCOS TELLEZ POBLETTE (CR-65200
IKE PAUL JIMMERSON (CR-66089)
FREDDY ELIZONDO MARTINEZ (CR-66988)
TERRY LYN O'DEL (CR-67334)
WILLIAM WHYTASHA MORGAN (CR-67651)
EUGENE ALVARDO VASQUEZ (CR-67864)

MINUTE ENTRY

UNDER ADVISEMENT RULING

The Court, having read and considered the pleadings, testimony, exhibits and arguments of counsel, finds and rules as follows:

I

FINDINGS OF FACT

1. The Department of Public Safety (DPS) has been using an ADAMS capable Intoxilyzer 5000 at the Pima County Jail since at least 1996. That device has a memory that stores virtually every action performed by that device . The memory specifically stores every subject test, every concurrent calibration check, every final 31-day calibration check, every final 90-day quality assurance test, every diagnostic test, and all error codes or messages.

2. The ADAMS data contains information relating to operator and machine errors that is factually impossible to obtain by paper record. The data also contains information relating to operator and machine errors that could only be duplicated by obtaining every paper record generated by the device. Paper records for every record generated by the device are not maintained in an accessible manner, nor are they regularly disclosed.

3. Data from the ADAMS system has identified problems that were not reported on paper records and has identified instances where the paper records were inaccurate. Further, data from the ADAMS system has proven that particular test results are unreliable where paper records indicated no problems with the reliability of the results.

4. Operator errors that the ADAMS data can

detect include problems with mouth alcohol or deprivation periods, misinterpretation of error messages or codes, radio frequency interference problems, and deficient samples. Each of these problems is supported by expert testimony identifying instances in which data from the ADAMS system was uniquely able to detect the problem. Each of these operator errors can indicate a problem with the accuracy or reliability of the intoxilyzer.

5. The ADAMS data can also be used to challenge an individual operator's proficiency with using the device or with instructing suspects on how to successfully complete the tests and is relevant as to whether or not a defendant actually refused to complete a breath test.

6. Machine errors that the ADAMS data can detect include problems with condensation in the breath hose, evidence that the machine has been repaired or flooded with simulator solution, out of tolerance DVM values, problems with the light source, range errors, interferant problems, and calibration check failures.

7. Each of the above-enumerated problems is supported by expert testimony indicating that the ADAMS data was uniquely able to detect the problem. Each of these problems may raise questions about or completely invalidate the accuracy or reliability of individual intoxilyzer results. Such evidence has been successfully used to attack the accuracy and reliability of the device in jury trials. The presence or absence of these issues is relevant on the trier of fact's reliance on the breath test results. These examples of operator and machine errors are direct evidence that those devices were not in proper operating condition at the time of individual subject tests. Such information is relevant to rebut the presumption that a device was in operating condition.

8. The State has been on notice of the nature and quality of the ADAMS data at least since this issue began to be litigated in 1996. The data contained in the ADAMS sys-

tem can be downloaded in a variety of ways including via a modem with a dedicated land or cellular phone line, via modem with a communications switch and a shared phone line, or directly onto a personal computer. If the data is not downloaded on a regular basis, the memory capacity of the device is exhausted with approximately 100 subject tests. Once the memory is full, new data will overwrite the oldest data. To date, no data from the ADAMS intoxilyzer at the Pima County Jail has been preserved. The device is not connected to a modem of any type. A direct link to a personal computer has never been attempted.

9. The cost of connecting the device to a modem and downloading the data is negligible. The device could be put "on line" for as little as approximately $200 by sharing a fax line. The State has known about this option since at least 1997. The DPS admits funding exists in the DPS budget to cover this expense. The assertion that excessive cost prohibited the DPS from disclosing the data is not supported by the evidence. The local DPS has never attempted to put the device on line. The DPS has never attempted to secure the cooperation of the Pima County Sheriff's Department or Pretrial Services. The director of Pretrial Services testified that cooperation would have been forthright if any agency had requested a phone line or sharing a fax line. The Pima County Sheriff's personnel responsible for operational decisions regarding the phone system testified that they made no efforts to put the intoxilyzer on line, nor was any such request made by anyone in the Pima County Sheriff's Office, the Pima County Attorney's Office, or the Department of Public Safety. When the telephone system was replaced in 1999, a phone number and line could have been established with little additional effort and cost.

10. The various heads of the vehicular offenses unit of the Pima County Attorney's Office have consulted with the local DPS concerning this issue. The local DPS specifically cited concerns that preserving and disclosing the data might jeopardize the ability of the State to prosecute

DUI cases because motions in Phoenix had successfully challenged issues regarding how the data was being handled once it was downloaded during a discrete period of time.

11. The local DPS acknowledges that it would be possible to maintain paper records of quality assurance procedures in addition to the ADAMS data. Also, per the stipulations of the parties, the BFMLOGG records all activity including any modification or deletion of ADAMS data. The existence and contents of that log was disclosed in June of 1999. The disclosure of that log provides a way to check if data is being deleted or altered.

12. The Pima County Attorney's Office was previously ordered by the Hon. Clark W. Munger, a Pima County Superior Court Judge, to preserve and disclose 30 days of ADAMS data directly relevant to a pending DUI case. The Deputy County Attorney representing the State of Arizona indicated that the State would comply with the Court's order. The Pima County Attorney's Office then made minimal attempts to comply with the Court's order. Subsequently, the Pima County Attorney's Office requested a stay of proceedings in order to challenge the original order to disclose some ADAMS data. Two different Deputy County Attorneys and the supervisor of the vehicular offenses unit represented the State at that hearing. Judge Munger gave the State one week to file the special action and ordered that if the special action was not filed, to notify the Court so that proceedings could resume. On the deadline for filing the special action, the defendant in *State v. Hartland*, as well as Mr. Perez, CR-63362, and Mr. Ramirez, CR-63577 (the defendants in the two cases joined with *Hartland* for purposes of litigating the ADAMS issue) entered into plea agreements, thus making the disclosure order moot.

13. At no time has the Pima County Attorney's Office encouraged the local DPS, the Pima County Sheriff's Office personnel at the jail, or Pretrial Services to make any effort to put the intoxilyzer at the Pima County Jail on

line. The Court takes judicial notice that the Pima County Attorney's Office has the power and authority to recommend to local law enforcement agencies policies regarding what evidence is collected and how it is preserved. The Pima County Attorney's Office has consistently challenged and litigated efforts to require disclosure of the ADAMS data.

II

CONCLUSIONS OF LAW

1. The intoxilyzer located at the Pima County Adult Detention Center has, and currently does, record information that, taken as a whole, is exculpatory. As to individual cases, the information is potentially exculpatory because the exact quality of the information cannot be known without disclosure of that information. The ADAMS data is information that tends to mitigate or negate an individual defendant's guilt under Rule 15.1(a)(7) of the Arizona Rules of Criminal Procedure.

2. The defendants have shown a substantial need for the ADAMS data and there is no ability of the defendants to obtain a substantial equivalent by any other means under Rule 15.1(e) of the Arizona Rules of Criminal Procedure.

3. The information exists in the memory of the intoxilyzer long enough for it to be under the control of the State. Rule 15, therefore, mandates that the ADAMS data be disclosed.

4. The ADAMS data is a record of periodic maintenance that is subject to preservation, inspection, and reproduction under A.R.S. §§ 39-121 and 39-121.01.

5. The ADAMS data, as a whole is exculpatory evidence under the control of the prosecutor, and the lack of that information prejudices the accused. Therefore, *Brady v. Maryland*, 373 U.S. 83 (1963), applies . The State cannot elimi-

nate a *Brady* violation by intentionally or knowingly allowing the non-disclosed information to be systematically destroyed. The State's failure to preserve and disclose the ADAMS data is inexcusable in light of continuous specific requests for preservation of the ADAMS data and the practical ease by which the data can be presented and disclosed. Dismissal is an appropriate remedy under *Brady, supra,* and *State v. Lopez,* 156 Ariz. 573, 574 P2d 300 (1987).

6. The defendants have established that the State has acted in bad faith in that it has intentionally or at least knowingly allowed evidence that is, in general terms, clearly exculpatory to be systematically destroyed. The State has also acted in bad faith by permitting the destruction of the ADAMS data to avoid the possibility that disclosure of the data will lead to additional litigation regarding the actions of the State. The police and prosecutor's claim that the decision not to preserve the ADAMS data is justified by a fear that defendants may be able to challenge subsequent conduct by the State is untenable.

7. The State's assertion that the cost of preserving the ADAMS data is prohibitively high is unreasonable. The evidence clearly indicates that the costs involved are nominal and that the State has the resources to preserve and disclose the requested data.

8. Because the defendants have established that the State has acted in bad faith, the Due Process Clauses of the United States and Arizona Constitutions mandate that the cases be dismissed under *Arizona v. Youngblood,* 488 U.S. 51 (1988) and *Arizona v. Youngblood,* 173 Ariz. 502 (1993). Notwithstanding the federal *Youngblood* decision, relief is still required under the federal Due Process Clause. The State's use of the intoxilyzer results in its case in chief is a significant distinguishing factor and is fundamentally unfair under *State v. Leslie,* 147 Ariz. 38 (1985). The type of evidence, the timing of the request to preserve the evidence, and the State's knowledge of the type and nature of the data are all sig-

nificant factors that distinguish this case from the *Youngblood* case. Notwithstanding the state *Youngblood* decision, relief is still required under the Due Process Clause of the Arizona Constitution. The unique nature of DUI cases can and has established an affirmative duty of the State to preserve evidence. See *State ex rel. Dean v. Superior Court*, 163 Ariz. 510, 789 P2d 180 (1990); *State v. Velasco*, 165 Ariz. 480, 799 P2d 821 (1990); *Montano v. Superior Court*, 149 Ariz. 385, 719 P2d 271 (1986); *Scales v. Superior Court*, 122 Ariz. 231, 594 P2d 97 (1979); *Baca v. Smith*, 124 Ariz. 353, 604 P2d 617 (1979).

9. Arizona case law also mandates that persons accused of DUI have an opportunity to rebut the prima facie showing that an intoxilyzer is in proper operating condition and to attack the reliability of the intoxilyzer in front of the trier of fact. *State ex rel. McDougall v. Superior Court in and for the County of Maricopa, Stock Real Party in Interest*, 181 Ariz. 202, 206, 888 P2d 1389, 1393 (App. 1995); *Moss v. Superior Court*, 175 Ariz. 348, 857 P2d 400 (App. 1993). The ADAMS data is the exact type and quality of evidence contemplated by the Court of Appeals in those cases.

10. The State's assertion that the foundational requirements of A.R.S. § 28-1323 has been met is irrelevant as to whether or not the ADAMS data must be disclosed. The statute establishes one method of establishing admissibility of breath test results. It does not establish that, once met, the results are irrebuttable and that the State is not required to disclose information useful or necessary to challenge those results.

11. The State's assertion that concurrent calibration checks coupled with a 15-minute deprivation period, duplicate testing, and agreement within 0.02 alcohol content eliminate the possibility of erroneous or inaccurate results and eliminate any need for disclosure of the ADAMS data is rejected as not complying with the Due Process Clauses of the United States and Arizona Constitutions as well as Arizona statutes. While the Intoxilyzer 5000 may be a reliable device,

there is no such thing as irrebuttable evidence. Furthermore, that assertion is not supported by credible scientific evidence.

12. The policy concern of statewide uniformity in the administration of breath testing includes the quality control programs used by the State under *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P2d 121 (1983). The ADAMS data is necessary to assess compliance with that program and should be made available regardless of the location of the ADAMS intoxilyzer.

For all of the above reasons, **IT IS ORDERED** that all pending DUI charges in the above cause numbers are dismissed with prejudice.

/s/
HON. CHARLES S. SABALOS

cc: Hon. Charles S. Sabalos
Criminal Calendaring
County Attorney - Bradley Roach
Public Defender - Dean Brault
Michael Rosenbluth
Tyler Francis
Clerk of Court - Under Advisement Clerk
Robert J. Zohlman, Esq.
Sidney Wolitzky, Esq

Karen Phillips (med)
Deputy Clerk

APPENDIX C

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
January 31, 2001 (9:56 a.m.)
By: June Lee (med)

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CHARLES S. SABALOS

CASE NO.	C-20003031	CR-20022990
	CR-65200	CR-66089
	CR-66988	CR-67334
	CR-67651	CR-67864
	CR-20011450	CR-2003412

COURT REPORTER: NONE DATE: January 25, 2001

C-20003031

JOSE SANTIAGO ESPINOZA, et al.,

vs.

HON. JACK PEYTON

FOR PURPOSES OF THIS MINUTE ENTRY ONLY

STATE OF ARIZONA

VS.

RIGOBERTO LUJAN, JR. (CR-20002990)

MARCOS TELLEZ POBLETTE (CR-65200)
IKE PAUL JIMMERSON (CR-66089)
FREDDY ELIZONDO MARTINEZ (CR-66988)
TERRY LYN O'DEL (CR-67334)
WILLIAM WHYTASHA MORGAN (CR-67651)
EUGENE ALVARDO VASQUEZ (CR-67864)
REGINALD COLE JOHNSON (CR-20011450)
MIGUEL CANEDO AVILEZ (CR-20003412)

MINUTE ENTRY

IN CHAMBERS MINUTE ENTRY AMENDING CAPTION

IT IS ORDERED the Minute Entry dated January 25, 2001, is amended to reflect that the civil matter, Espinosa v. Peyton, C-20003031, is deleted from the caption.

IT IS FURTHER ORDERED that the following cases be added to and included in the caption for all future paperwork:

State of Arizona v. Johnson, CR-20001420

State of Arizona v. Avilez, CR-20003412

cc: Hon. Charles S. Sabalos
Criminal Calendaring
County Attorney - Bradley Roach
Public Defender - Dean Brault
Michael Rosenbluth
Tyler Francis
Clerk of Court- Civil
Robert J. Zohlman, Esq.
Sidney Wolitzky, Esq.

June Lee (med)
Deputy Clerk

APPENDIX D

SUPREME COURT
STATE OF ARIZONA

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. TEMPLEY
CHIEF DEPUTY CLERK

October 31, 2002

RE: STATE OF ARIZONA vs TERRY LYNN O'DELL
Arizona Supreme Court No. CR-02-0269-PR
Court of Appeals Division Two No. 2 CA-CR 01-0031
Pima County Superior Court No. CR-67334

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 29, 2002, in regard to the above-referenced cause:

ORDERED: Petition for Review to Arizona Supreme Court = DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 31st day of October, 2002.

Noel K. Dessaint, Clerk

TO:
Hon. Janet A. Napolitano, Arizona Attorney General
Attn: Randall M. Howe, Chief Counsel

Barbara LaWall, Pima County Attorney
Attn: Bradley K. Roach, Esq. and Elizabeth Hurley, Esq.
Susan A. Kettlewell, Pima County Public Defender
Attn: Dean J. Brault, Esq.
Terry Lynn O'Dell
W. Clifford Girard, Jr., Esq.
Jeffrey P. Handler, Clerk, Court of Appeals, Division Two, Tucson
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